

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
DOMINIQUE GRACE,)
Defendant.)
Case No. 2:16-cr-00052-GMN-CWH
REPORT AND RECOMMENDATION

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Before the court is Defendant Dominique Grace's Sealed Motion for Hearing to Determine Competency (ECF No. 148), filed April 27, 2017. The unopposed motion for a psychiatric examination under 18 U.S.C. §§ 4241, 4242, 4247, and Rule 12.2(c) of the Federal Rules of Criminal Procedure was granted on May 23, 2017. (Order (ECF No. 156).) The court received the psychiatric report on August 4, 2017, and conducted a competency hearing on November 28, 2017. (Mins. of Proceedings (ECF No. 223).) The court has considered the moving papers, reports, and testimony at the hearing, and finds that Grace is competent to stand trial and able to assist his counsel.

I. BACKGROUND

Grace is charged in an Indictment returned February 23, 2016 with conspiracy to distribute a controlled substance in violation of 18 U.S.C. § 846(a)(1), 841(a)(1) and 841(b)(1)(A)(iii). (Indictment (ECF No. 1).) Grace made an initial appearance, received appointed counsel, and was arraigned on April 1, 2016. Several continuances of the trial date were granted, and trial is currently set for January 22, 2018.

In his motion for a hearing on the question of competency, Grace's defense counsel explained that as he attempted to prepare the case for trial, Grace demonstrated low cognitive abilities and an inability to understand documents which presented to him. Defense counsel

1 hired Dr. Thomas Kinsora, a Las Vegas based neuro-psychologist to assess Grace's level of
2 functioning. Dr. Kinsora opines that Grace is not competent to assist counsel.

3 In response, the government obtained a report from Dr. Jaime Juaregui, a forensic
4 psychologist at the Metropolitan Correctional Center ("MCC"), Federal Bureau of Prisons, San
5 Diego, which opined that Grace was competent to assist his counsel, and to understand the nature
6 of the proceedings against him. Given the difference of opinion between the evaluating doctors and
7 for reasonable cause shown, a competency hearing was conducted on November 28, 2017 to
8 determine Grace's competency to stand trial.

9 **II. DISCUSSION**

10 **A. Legal Standards**

11 The due process clause of the Fifth Amendment prohibits trying a defendant who is
12 mentally incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate v. Robinson*, 383 U.S.
13 375, 378 (1966). "A person whose mental condition is such that he lacks the capacity to
14 understand the nature and object of the proceedings against him, to consult with counsel, and to
15 assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162,
16 171 (1975).

17 The treatment of offenders suffering from a mental disease or defect is governed by the
18 Insanity Defense Reform Act of 1984. 18 U.S.C. §§ 4241-48. The Federal Criminal Code
19 establishes a multipart statutory scheme for addressing offenders suffering from a mental disease or
20 defect who have pending federal charges. If a question is raised concerning whether a defendant is
21 competent to stand trial or assist in his defense, the court first determines whether the defendant
22 suffers from a mental disease or defect rendering him mentally incompetent to the extent that he is
23 unable to understand the nature and consequences of the proceedings against him, or to assist
24 properly in his defense. 18 U.S.C. § 4241(a), and (d). See also *United States v. Friedman*, 366 F.3d
25 975, 980 (9th Cir. 2004). Section 4241(a) provides that whenever the court has reasonable cause to
26 believe a defendant is suffering from a mental disease or defect rendering him unable to understand
27 the nature and consequences of the proceedings against him or to assist properly in his defense, the
28 court shall conduct a hearing to determine the defendant's competency. Section 4241(d)

1 establishes a two-part test of competency. *Id.* A defendant must be able both to understand the
2 nature of the proceedings against him, and to assist properly in his defense. *Id.*

3 In *Dusky v. United States*, 362 U.S. 402 (1960), the Supreme Court held that the test for
4 determining whether a defendant is competent to stand trial is “whether he has sufficient present
5 ability to consult with his lawyer with a reasonable degree of rational understanding—and whether
6 he has a rational as well as factual understanding of the proceedings against him.” *See also Cooper*
7 *v. Oklahoma*, 517 U.S. 348, 356 (1996) (quoting *Dusky* and stating the test for incompetence is
8 well settled). Although the statute providing for competency hearings does not allocate the burden
9 of proof, in the Ninth Circuit, the government has the burden of demonstrating by a preponderance
10 of the evidence that the defendant is competent to stand trial. *United States v. Hoskie*, 950 F.2d
11 1388, 1392 (9th Cir. 1991). The Ninth Circuit reviews a district court’s determination of a
12 defendant’s competency to stand trial for clear error. *United States v. Gastelum-Almeida*, 298 F. 3d
13 1167, 1171 (9th Cir. 2002).

14 **B. Common Findings**

15 At the competency hearing, the parties stipulated, and the court agrees, that both doctors
16 were properly certified to conduct the psychological evaluations. *See* Def. Ex. A (Dr. Kinsora
17 curricula vitae) and Gov’t Ex. 1 (Dr. Juaregui curricula vitae). Both doctors testified, and their
18 evaluations were admitted into evidence. *See* Def. Ex. B and Gov’t Ex. 2. Additionally, Patricia
19 Ann Grace, Grace’s mother, testified about her son, and Damen Barnes, Grace’s brother, also
20 testified. The following summarizes their reports and testimony.

21 Grace is 39 years old and an average height and weight African American. He was found to
22 be friendly, polite, and mostly cooperative, socially appropriate, and able to establish and maintain
23 good rapport. He had normal affect, did not display any odd or bizarre behavior, remained fully
24 oriented, and his speech was normal. He was talkative and personable.

25 Grace was raised by his mother, has five step siblings, and has lived with and depended
26 upon his mother most of his life. Grace’s medical history indicates he was delivered prematurely,
27 and consequently suffered development delays in walking, talking, and social interaction. He was
28 never able to read fluently, and suffered from learning problems. He probably suffered from at

1 least one concussion, and was hit in the eye with a rock at age 12-13.

2 Grace's educational history shows that he finished the 11th grade but quit in the 12th grade.
3 He took special education classes, and his grades were generally poor. His 8th grade standardized
4 testing showed that he fell below the 5th percentile in nearly all of his academic skill areas.

5 Prior to his detention for the current charge, he was living in a one bedroom apartment with
6 his son (3 years old at the time). Grace is able to recall historical information about his child. The
7 mother of his child died of bone cancer when the child was very young. He still mourns her death.
8 Grace supported himself and his son financially through social security disability payments. His
9 mother is his payee and he received \$800 per month. She provided Grace with cash to pay his rent
10 and monthly bills. He understands some aspects of handling money. Grace paid his landlord on
11 the first of the month, and then went to a local grocery store to pay his various bills. He typically
12 used cash and is unfamiliar with how to write checks, but was able to do so with some guidance.
13 He can address an envelope, use the phone, and handles his physical care. In the community, he
14 adhered to a schedule which involved waking up his son, eating breakfast, helping his son dress,
15 and caring for his hygiene. They often went to a park, to a movie, or to the mall. Grace walked his
16 son the short distance to his mother's home almost daily. He knows his phone number, phone
17 numbers of friends and family, and his address. He knows how to contact the landlord if there are
18 problems, and can verbalize how to handle household problems. He knows how to call the police
19 and get medical help .

20 Grace has never been employed, and was placed on disability in high school. He never has
21 had a drivers license, and has never taken out a loan. He has no hobbies. He was previously
22 convicted of possession of crack cocaine, and served several months in prison. He enjoys cannabis,
23 and used it throughout the day and would lace the joint with cocaine when he could afford it.

24 Grace's IQ of 61-67 placed his present intellectual functioning in the extremely low to
25 borderline range of cognitive ability. His verbal comprehension abilities were in the 3rd percentile,
26 borderline range, and perceptual reasoning abilities in the 2nd percentile, extremely low to
27 borderline range. He appeared to have a slightly greater capacity to understand verbal as opposed
28 to non-verbal stimuli. Grace's education achievement score indicated that he was in the lower

1 extreme range of 1st percentile in sentence comprehension, spelling, math computation, reading
2 composite, and in the 2nd percentile in word reading, suggesting that he would have difficulty with
3 comprehending written material, performing math equations, spelling words correctly, and reading
4 fluently. Tests showed that Grace showed no indication of an attempt to feign a memory
5 impairment.

6 **C. Grace understands the nature and consequences of the proceedings**

7 Dr. Juaregui and Dr. Kinsora agreed that Grace is cognitively impaired and suffers from
8 lifelong mild intellectual disability,¹ a mental disease or defect. Because of his disability, both
9 doctors agreed that Grace would have difficulty with comprehending written material, performing
10 mathematical equations, spelling words correctly, and reading fluently. Dr. Juaregui's report
11 thoroughly explains that Grace understands basic legal concepts, such as the duties of court
12 personnel, witnesses, plea bargaining, and sentencing. He also understands the concept of attorney-
13 client privilege and has a good relationship with his attorney. Dr. Kinsora's report indicates that he
14 believes Grace is unable to understand court proceedings, but on cross-examination, he changed his
15 opinion and indicated that Grace was able to understand the nature and consequences of the
16 proceedings. The evaluators disagree on whether Grace has the mental capacity to assist his
17 counsel in his defense.

18 **D. Whether Grace is able to assist his counsel**

19 *1. Dr. Kinsora's opinion*

20 On December 2, 2016, Dr. Kinsora evaluated Grace over a period of six hours at the federal
21 detention facility, and collected information regarding his social, educational, vocational, criminal
22 and medical histories, and additionally conducted numerous neuro-psychological tests, the results
23 of which are provided in his report.

24 Dr. Kinsora's tests establish, and he testified persuasively, that Grace is intellectually
25 disabled, that he demonstrates significant impairments in concentration, processing speed, abstract

27 ¹ Dr. Kinsora testified that his diagnosis of mild intellectual impairment and Dr. Juaregui's
28 diagnosis of mild cognitive impairment are consistent and essentially the same.

1 reasoning and vocabulary, spatial processing, memory and new learning, and executive function,
2 which he defined as using reasoning to solve problems. Grace is functionally illiterate, and suffers
3 from limitations in all academic areas, so he cannot be expected to read material given to him. For
4 verbal communications, he requires continual re-explaining before mastery can be expected, and
5 instructions need to be repeated. He is mixed up easily, and at times forgets what he was asked to
6 do. His own explanation of the events in his life are disorganized, and do not make sense. Dr.
7 Kinsora testified that Grace would not be able to read and understand a plea agreement, and that he
8 will sometimes affirm understanding when he really does not understand. He does not play up on
9 his deficiencies and seems to have poor insight into how impaired he really is.

10 Dr. Kinsora testified that the difficulty for Grace is to learn material, but that once he learns
11 information, he retains it. He testified that repetition yields results, and that Grace would be able to
12 understand a conspiracy allegation if it were explained to him. Dr. Kinsora believes that Grace
13 seems baffled as to why he is currently incarcerated, and his attempt to explain the reasons for his
14 arrest confused both Dr. Kinsora and his assistant.

15 Dr. Kinsora believes that Grace has great difficulty understanding his world. He will have
16 significant problems understanding court proceedings and any complex verbal instruction, despite
17 his familiarity with the judicial system. Dr. Kinsora did not believe that Grace could live
18 independently, and does not believe that Grace's competency could be restored through medication
19 or programs. He testified that Grace does "okay" in a highly structured environment.

20 In his report, he indicates that Grace does not fully understand the court proceedings, or the
21 role of the prosecutor, and only a very rudimentary understanding of the role of his own attorney or
22 the judge. Accordingly, Dr. Kinsora's report indicates that based upon his overall presentation,
23 including performance on neuro-psychological measures, and his educational records, his diagnosis
24 is that Grace is intellectually disabled, mild, and it is reasonable to conclude that Grace does not
25 understand the court proceedings as required,² and currently is not able to assist counsel in his own
26

27 ² On cross-examination, Dr. Kinsora agreed that Grace would be able to understand the nature
28 and consequences of the court proceedings.

1 defense.

2 *2. Dr. Jauregui's opinion*

3 Dr. Juaregui's report indicates that she conducted an evaluation of Mr. Grace at MCC over
4 an 18 hour period over seven different days from July 5, 2017 until August 4, 2017. The evaluation
5 included clinical interviews, observation of his behavior at the facility, a review of legal
6 documents, and administration of various psychological tests. Supplemental information was
7 gathered through a review of medical records, review of the evaluation by Dr. Kinsora, review of
8 recorded phone calls made by defendant while at the MCC, and consultation with MCC staff.

9 Dr. Juaregui's report indicates that Grace was able to recall specific dates, circumstances,
10 and details of various events from his distant and recent life. However, initially, when attempts
11 were made to speak about his current alleged offense, he often made the same comment repeatedly
12 that he did not know, did not understand, or did not remember. He initially appeared very guarded
13 and unwilling to discuss any details associated with his case. This changed toward the end of the
14 evaluation, as he was willing to be more open with Dr. Juaregui, but he continued to appear quite
15 nervous. This was in contrast to their discussions of other topics, at which times he appeared
16 relaxed, volunteered information, and elaborated spontaneously.

17 Since his arrival the MCC, Grace has been housed in the general population housing unit.
18 While in the institution, he followed directions and never appeared to be in any acute distress. He
19 stated he spent time watching TV, socializing, and reading. During the first meeting, Grace asked
20 to borrow two books from the bookshelf outside of her office. He was offered two books but
21 returned them the following day stating that he "couldn't get into them." He stated that he enjoyed
22 books by Steven King and James Patterson, which are not available at the MCC. He claimed that
23 he enjoyed reading, but sometimes had to cover his left eye when the words became blurry. Dr.
24 Juaregui observed Grace on several occasions in the waiting area of her office. He often was
25 socializing and speaking to other inmates. On one occasion, he stopped her as she was walking and
26 joked that she "forgot about him" because it had been several days since their last meeting. He
27 remembered the exact dates and times that they had agreed to meet and asked why she had not met
28 with him on that specific date. On another occasion, he missed his opportunity to go to shop in the

inmate store because they were meeting during that time. When he learned that he missed his opportunity to shop, he was visibly upset. Dr. Juaregui laid out a plan for Grace and told him she would see about him attending commissary the following day. Unfortunately, this could not occur, and when Grace was so informed, he asked detailed questions about the commissary, why he was unable to attend on a different day, and who he could speak to further about the issue.

Dr. Juaregui diagnosed Grace with Intellectual Disability, Mild.³ Intellectual disability is characterized by deficits in cognitive ability (i.e. reasoning, problem solving, abstract thinking, judgment, academic learning, and learning from experience) which results in an impairment in adaptive functioning. Adaptive functioning includes life skills such as communication, social participation, occupational functioning, and personal independence. Dr. Juaregui opines that although Grace's IQ is 67, which falls into the extremely low to borderline range, this is potentially an under representation of his ability. The levels of severity of an intellectual disability (i.e. mild, moderate, severe, profound) are based on the individuals adaptive functioning, not their IQ score. Having an intellectual disability does not preclude a person from understanding concepts or exhibiting an ability to learn new information or perform tasks. Rather, it means that they may simply require more support throughout their life. Individuals with mild severity of intellectual disability such as Grace are often able to function age-appropriately in personal care, but sometimes need assistance in daily living tasks. Grace appears able to handle most of his day-to-day tasks quite well without assistance. He lives independently, cares for his son, goes grocery shopping, prepares food, and pays his bills and rent. In addition, he communicates well with others, is socially appropriate, and appears to have positive relationships with friends and family. However, he appears gullible, easily suggestible, and likely at risk of being manipulated by others.

Individuals with mild intellectual disability generally need support with informed health care decisions, legal decisions, and support is also often needed to raise a family. Conceptually, Grace has difficulty with academic skills including writing, reading, comprehension of written

³ Grace self reported marijuana and cocaine addiction for over 20 years, and so he was also diagnosed with Stimulant Use Disorder (Cocaine) and Cannabis Use Disorder.

1 material and arithmetic. However, he demonstrated a good short term memory and an ability to
2 retain information well when repeated to him or explained in a simply way. He often reiterated
3 exactly what Dr. Juaregui had expressed to him during their meetings, days later during telephone
4 calls. He exhibited a good ability to recall distant and recent aspects of his life. In general she
5 found his adaptive functioning in areas such as communication, social participation, and personal
6 independence are quite good.

7 Dr. Juaregui notes that it appears that Grace has internalized the notion that he is mentally
8 challenged and therefore can not or should not be expected to learn, understand, or remember.
9 Grace's behavior and self-concept appears to be heavily influenced by his mother and her repeated
10 statements reminding him that he is slow and does not have the capacity to learn and understand
11 things, as was reflected in several recorded telephone calls with his mother while at the MCC.
12 Consequently, at least initially, Grace had a tendency to reiterate that he "doesn't know," "can't
13 recall," or "can't comprehend" but this appeared selective only to questions posed relating to his
14 legal case.

15 Dr. Juaregui opined that Grace's prognosis is good, that he may benefit from independent
16 living skills training, and counseling regarding substance abuse, self-esteem, and relationships. He
17 acknowledges feelings of guilt regarding his prolonged substance abuse, criminal activity, and the
18 impact it has on both himself and others.

19 After extensive discussions with Grace, Dr. Juaregui reported that Grace was able to define
20 the terms "conspiracy" and how it applied to his case. He said that he is accused of making an
21 agreement with a group of people to sell drugs. His main "confusion" appears to be with the reason
22 why is charged with conspiracy. Grace contends both he and his attorney have discussed a lack of
23 solid evidence connecting him to the conspiracy. Grace believes that his charge should only
24 include the possession of cocaine, and since he already served time for that charge, he is therefore
25 "confused" and does not understand. Dr. Juaregui believes that Grace very well understands the
26 details associated with his case, knowing there are eight people charged on his indictment. He
27 refers to them as his co-de's (slang for co-defendant) and he indicated that he has frequent contact
28 with them while at the detention center in Las Vegas. He claimed they help him with his case. In

1 addition, in a recorded phone call, Grace told a friend about the status of two of his co-defendants
2 and the length of sentences that they received.

3 Dr. Juaregui believes that Grace understands basic legal concepts, the duties of the
4 prosecutor and defense counsel, and witnesses, the concept of a plea bargain, probation, minimum
5 and maximum sentences, pleas of guilty and not guilty, and the legal consequences of each. He
6 understands the plea of not guilty by reason of insanity, and at least initially, he believed that the
7 best way he could be defended against the current charge is "I guess insanity, because I don't
8 understand. My mom says I've been like that my whole life . . . that I'm out supposedly
9 committing crimes and I don't understand what I'm doing."

10 Grace knows his attorney's name, is able to recall previous interactions he had with his
11 attorney and has confidence in his attorney's ability to defend him. He understood the concept of
12 attorney/client privilege, and he appreciates that his attorney has taken the time to explain things to
13 him, and he is willing to continue to follow the advice of his counsel.

14 In summary, Dr. Juaregui opined that Grace has a mild intellectual disability, however, this
15 disability does not substantially impair his present ability to understand the nature and
16 consequences of the court proceedings brought against him, or substantially impair his ability to
17 properly assist counsel in a defense.

18 **E. Mr. Barnes' and Mrs. Grace's Testimony**

19 Mr. Damen Barnes, Grace's older brother, testified and confirmed Grace's intellectual
20 disabilities and the circumstances of his upbringing. He said Grace did not read books. He
21 recalled that Grace lived in an apartment with his son for a short time, but was evicted because he
22 did not want to pay his rent. He testified that Grace held a job with a temporary service doing
23 manual labor for about three months, but then quit. He believes his brother is gullible and easily
24 manipulated.

25 Patricia Grace, Defendant's mother, testified on his behalf at the hearing. She outlined the
26 circumstances of his birth, and the resulting intellectual challenges. Grace has always lived with
27 his mother, except when he was in prison and for a short three month period when he lived with his
28 son in a nearby apartment. She indicated that she helped Grace every day when he lived in the

1 apartment with his son. Mrs. Grace currently has custody of the child. She testified that Grace has
2 only briefly held a manual labor job. She indicated that Grace tends to act like he understands what
3 is going on around him, but really he usually does not understand, and has difficulty following
4 directions. Finally, Mrs. Grace indicated that when her son was at the MCC, she told her son that
5 he was there for a competency test, but not that he should not be truthful.

6 **F. Analysis**

7 While a finding of incompetency is predicated on the existence of a mental disease or
8 defect, the standard for evaluating a defendant's competency to stand trial is not a medical inquiry,
9 but rather a legal determination. *United States v. Makris*, 535 F.2d 899, 908 (5th Cir. 1976). Here,
10 the experts have agreed that Grace suffers from mental disability of mild intellectual impairment
11 and mild cognitive impairment. The experts also agree that he is able to understand the nature and
12 consequences of the proceedings against him. The evidence supports these conclusions, and the
13 court agrees.

14 The first prong of the *Dusky* standard, whether a defendant has "sufficient present ability to
15 consult with his lawyer with a reasonable degree of rational understanding," concerns a defendant's
16 ability to effectively participate in his defense by communicating effectively with his counsel. *See*
17 *Drope*, 420 U.S. at 171-72. The court is faced with competing opinions by the experts in this case
18 on the question of whether Grace can assist counsel in his defense with a reasonable degree of
19 rational understanding. The Supreme Court has noted that the concept of "rational understanding is
20 difficult to define." *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). The understanding should
21 be rational as well as factual – recollection of events is not sufficient. Rather, the defendant should
22 be able to confer with his counsel, to testify coherently, and to make a reasoned choice about
23 alternatives such as whether he should testify.

24 The court gave minimal weight to Mrs. Grace's testimony because she was clearly, and
25 perhaps understandably, biased in favor of her son and a finding that Grace was not responsible for
26 his actions because of his disability. Dr. Juaregui's report of Mrs. Grace's conversations with
27 Grace, who often told him, "you don't know what's going on," and urging him to tell Dr. Juaregui
28 that he was "not fit for trial" undermine the usefulness of her testimony in arriving at a decision

1 regarding Grace's competency. Mr. Barnes testimony confirmed that Grace suffers from learning
2 disabilities, and is easily manipulated.

3 The court has considered the familiarity and exposure of each evaluating expert witness
4 with Grace, the thoroughness of the evaluation performed, and the care with which the respective
5 experts reached their conclusions. It is clear that Dr. Juaregui had a much greater ability to observe
6 Grace in a variety of settings. She spent 18 hours over six days in testing, interviews, observing
7 him interacting with others, and monitoring his telephone calls with friends and family. Dr.
8 Kinsora only took six to seven hours, and much of the evaluation time was spent administering
9 various tests to determine Grace's mental disability. Dr. Kinsora noted that Grace got mixed up
10 easily, and test-taking instructions frequently had to be repeated. Dr. Kinsora's opinion is that
11 because Grace is intellectually disabled, and his explanation of event of his life are disorganized,
12 and often do not make sense, he will be unable to assist his counsel. Dr. Kinsora's discussion with
13 Grace regarding the charged offense simply concludes that Grace is "baffled as to why he is
14 currently incarcerated, and his attempt to explain the reasons for his arrest confused both this
15 examiner and his assistant." It does not appear that Dr. Kinsora and Grace ever got to the point of
16 discussing the charges, likely because Grace responded to Dr. Kinsora as he initially did with Dr.
17 Juaregui, saying that he didn't know or understand. Although he concludes that Grace cannot assist
18 counsel, he also recommends that assistance and additional time be provided to explain information
19 to Grace, which appears to indicate that with that support, Grace could effectively consult with
20 counsel.

21 Dr. Juaregui was direct, cogent, and produced a more thorough report, likely the result of
22 having much greater interaction with Grace. Her report generally agrees with Dr. Kinsora
23 regarding Grace's mental disability, but goes further by providing information which demonstrates
24 Grace's understanding of the legal process, the concept of conspiracy, relationships with co-
25 defendants, short and long term memory, and the influence that Grace's mother has on Grace's own
26 perception of his competency. The stark difference in the two opinions is that Dr. Juaregui was
27 able to develop more insight into the impact of Grace's disability, and she believes that Grace is
28 able to understand the nature of a conspiracy charge and his relationship with his co-defendants,

1 which would undoubtedly give him the ability to interact with counsel on those topics.

2 Grace told Dr. Juaregui that he was confused about the conspiracy charge because of a
3 perceived lack of evidence. The court notes that Grace's counsel, along with other defendants,
4 filed a motion for a bill of particulars in this case (ECF No. 119), arguing that the evidence of
5 conspiracy is lacking, and that the indictment is so generalized and generic that defendants are
6 unable to prepare a defense for trial. The court denied the request for a bill of particulars for
7 reasons set forth in its order. (Order (ECF No. 128)). It may be, however, that the reason for Grace
8 being confused about the case against him, or being unable to understand, is because the evidence
9 is neither strong nor clear. Given Grace's disability, it is likely that he is not a leader in the alleged
10 conspiracy, and his criminal liability may rest mainly upon the actions of co-conspirators who are
11 only tangentially related to him. Although the court has not reviewed the discovery in this case,
12 Grace's concern that there is a lack of evidence against him, a concern shared by his defense
13 counsel as argued in the motion for a bill of particulars, may be an entirely rational assessment of
14 the evidence.

15 Grace recognizes the wrongfulness of his possession of cocaine, and he understands that he
16 is alleged to have entered into an agreement with other individuals to sell cocaine. He therefore
17 appears to have a rational understanding of the charges. Grace has a good, cooperative
18 relationship with his counsel. Given Grace's ability to recall distant and recent events, retain
19 information, appreciate his counsel's advice, communicate relevant information to counsel, and
20 learn, albeit with some difficulty, about how his case will proceed, it appears Grace is competent to
21 consult with counsel.

22 The court finds that the Government has met its burden of establishing, by a preponderance
23 of the evidence, that Grace is competent to stand trial. Although he suffers from a mild intellectual
24 disability, it does not substantially impair his competence to stand trial. More specifically, the
25 court finds that Grace has the present ability to consult with his lawyer with a reasonable degree of
26 rational understanding, and that he possesses a rational as well as factual understanding of the
27 proceedings against him.

28 / / /

III. CONCLUSION AND RECOMMENDATION

Accordingly, **IT IS HEREBY RECOMMENDED** that Grace be required to stand trial based on the undersigned's findings that he is competent in that he has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

IV. NOTICE

This report and recommendation is submitted to the United States district judge assigned to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the District Court's Order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED: December 29, 2017

Curt H

**C.W. Hoffman, Jr.
United States Magistrate Judge**